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Canadian Administrative Law (ITLP201)

CASEBOOK

Instructor: Andrew Pinto

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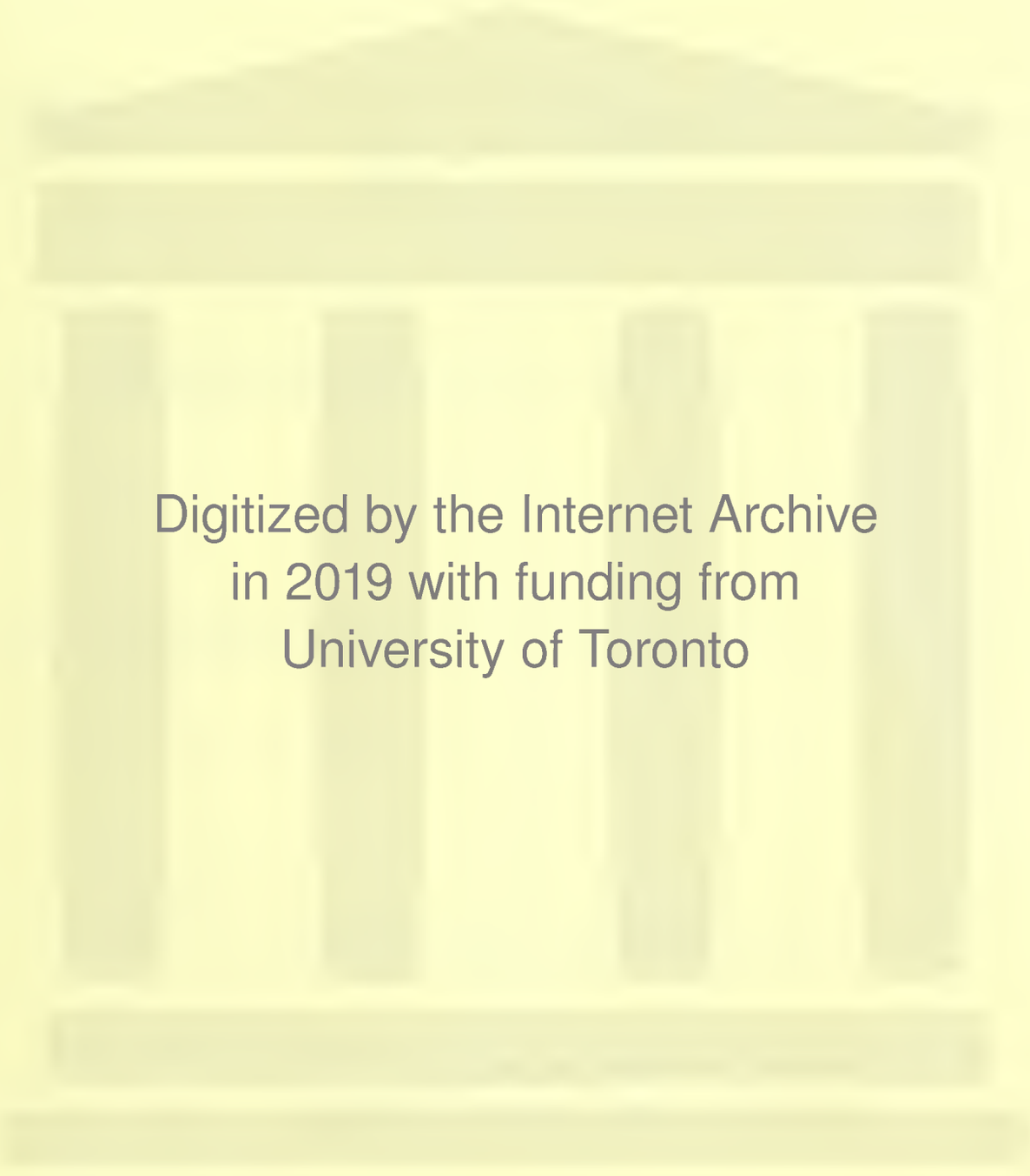

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Administrative Law

Nature of the course

Administrative Law is the body of law regulating the ways in which government operates. It is about the rules and limits that apply to not only the operations of the Crown, Cabinets, Ministers, government departments, and municipal corporations but also the various administrative tribunals and agencies deployed by governments for the carrying out of governmental functions of all kinds. It is concerned with the procedures by which all these various instruments of government operate, the jurisdictional and substantive limits on their mandates, and the remedial structures that exist to ensure that decision-makers of various kinds act in accordance with the rule of law. As well, throughout the course, candidates are encouraged to reflect upon the divide between public law and private law and, in particular, the circumstances under which governmental authorities of various kinds or in various capacities are subject not to the special regime of Administrative Law principles and remedies but to the private law rules of contract, tort, restitution and the like.

Some regard Administrative Law as simply a subset of Constitutional Law and, to the extent that, for example, the *Canadian Charter of Rights and Freedoms* and other constitutional and other *quasi*-constitutional enactments (such as the *Canadian Bill of Rights*) serve to place limits or constraints on the way in which public decision-makers act, there is overlap between this course and that in Constitutional Law. However, it is not a course about the policing of the divide between federal and provincial jurisdiction enshrined in the *Constitution Act, 1867* and the other statutes that constitute the Canadian constitution. Nor does it concern itself in detail with the constitutional incidents of the Crown, Parliament and the various legislative assemblies, or the executive branch.

Rather the primary questions considered in this course are:

1. The circumstances under which governmental decision-makers are subject to an obligation of procedural fairness to those affected by their decisions, and, where applicable, the content of that obligation.

2. The extent to which the substantive decisions of assigned decision-makers are subject to merits scrutiny by the courts in the name of jurisdiction or other principles of substantive review such as error of law, error of fact, and abuse of discretion, and especially the standard of review that reviewing courts bring to bear in exercising that constitutionally guaranteed capacity.

3. The remedial framework within which the superior courts, both federally and provincially, exercise their review powers.

4. The bases upon which the courts will not only exercise direct powers of review but also provide monetary compensation for wrongful administrative action.

Some of you will bring to this course some knowledge of Administrative Law acquired during your legal studies in other jurisdictions. Sometimes, that knowledge will be useful even if the applicable case law is different. However, be very cautious in the deployment of knowledge gained elsewhere. There are some very distinctive aspects of Canadian public law that do not find analogues or exact parallels in other common law or British Commonwealth jurisdictions. In answering the examination in this course, you act at your peril if you automatically start applying the principles and the case law from the jurisdiction of your initial legal training.

Casebook

The assigned material on which candidates will be examined are Van Harten, Heckman, and Mullan, Administrative Law: Cases, Text & Materials (Toronto: Emond Montgomery Publications Ltd., 6th ed., 2010), and Colleen Flood and Lorne Sossin, Administrative Law in Context (Toronto, Emond Montgomery, 2008). Detailed page assignments are outlined below in the study guide. These page assignments should be taken seriously. Do not assume that you will be able to pass this course by simply reading one of the supplementary texts from the list below or even notes based on or provided by various courses and websites that offer assistance in preparing for NCA exams.

Knowledge of the assigned readings is essential.

Objectives

Candidates should master these materials and the principles of Administrative Law embodied in the various segments of the course to the extent necessary to enable them to answer problem-type questions on a three-hour, open book final examination. Samples are available online at the NCA website.

As well as knowledge of the principles and rules of Canadian Administrative Law, candidates are expected to display an aptitude for the application of that knowledge in the context of specific fact situations. That will involve an ability to analyse and distill relatively complex facts, to relate the law as identified to the salient facts, and to reason towards a conclusion in the form of advice to a client or the likely judgment of a court confronted by such a problem. Since administrative law usually involves powers bestowed on administrative decision-makers by statute, students will often be required to read and understand statutory provisions provided on the exam that enable administrative actors.

Supplementary Texts

Candidates wishing to consult texts for further clarification and elaboration of the various principles of Administrative Law are directed to the following:

Sara Blake, Administrative Law in Canada (Toronto: LexisNexis-Butterworths, 4th ed., 2006).

David J.M. Brown and John M. Evans, Judicial Review of Administrative Action in Canada (2 volumes) (Toronto: Canvasback, 1998) (a looseleaf service).

David Phillip Jones and Anne S. de Villars, Principles of Administrative Law (Toronto: Carswell, 5th ed., Student, 2009).

David J. Mullan, Administrative Law (Toronto: Irwin Law, 2001).

Guy Régimbald, Canadian Administrative Law (Toronto: LexisNexis Canada, 2008)

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Study Guide

Subject Matter	CB and S&F Readings (begin at the first heading on the first assigned page and end at the first heading of the last assigned page, if any, unless otherwise instructed)
1. Setting the Stage	CB, Chapter 1; S&F Chapter 1

One of the most important things to understand in studying administrative law is the "big picture". A failure to do so may result in candidates becoming lost in extraneous details.

The critical idea at the core of that administrative law is this: it is the body of law that governs how people exercising power pursuant to a delegation of power in a statute (or occasionally the royal prerogative) go about their business. In most cases, the people who have this form of power (again, typically given to them by a statute) are members of the executive branch of government, although often at some arm's length from it. In our system, based on the rule of law, we want to make sure that people with this power exercise it properly. Almost all of administrative law is about deciding what we mean by "properly".

CB chapter 1 and S&F chapter 1 provide an excellent overview of why administrative law matters, and also the core elements of administrative law doctrine. In this syllabus, we follow the approach described on p.11, dividing the discipline into three parts:

- procedural fairness (or more generally, procedural expectations that administrative decision-makers must meet);
- substantive constraints (or more generally the sorts of substantive errors administrative decision-makers must avoid); and
- challenging administrative decisions and remedies on judicial review (or more generally, the relief available to a person who wishes to challenge an administrative decision and the procedure to be followed in seeking this relief).

(One word of warning: In reading the S&F chapter and any of the materials, be wary of the discussion of three standards of review for substantive judicial review. In S&F, chapter 1, this is found on p.14. As footnote 16 on that page notes, that tripartite scheme has now been replaced by a double standard of review, after *Dunsmuir*. More on that below. A second word of warning: CB, p.26 outlines a high level description of grounds of judicial review in administrative law. It is, of course, correct, but it is very much at the highest level – the actual way in which grounds of review tend to be applied is a little different. For instance, courts speak of procedural fairness and, in the area of substantive review, they talk about errors of law, fact and discretion (and now, once again, occasionally jurisdiction). It is these concepts that are important in putting administrative law into practice.)

Procedural Fairness Materials	S&F, chapters 5, 6, 7 and 13
2. Sources of Procedural Obligations	CB 77-85; 278-285

We begin with procedural obligations that adminisrative decision-makers must observe in exercising their powers. The starting point is understanding where these come from. As the assigned readings suggest, the answer is: from several places. The assigned readings talk about enabling legislation, delegated legislation, guidelines (although for reasons discussed in the material below, be cautious with these), and the common law. We also include a few pages discussing "general statutes about procedure" – that is, special provincial-level statutes imposing procedural rules on the provincial administrative decision-makers to which they apply.

To this list, you must also add the *Charter of Rights and Freedoms* (section 7 is really the only provision that matters for our purposes) and (for *federal* administrative decision-makers), the *Canadian Bill of Rights*. More on those later.

3. Procedural Obligation Triggers (Knight "Three-Prong" and the Concept of "Legitimate Expectation")	CB 85-105; 109-113; 132-156; 157-176.

Now that you understand that procedural obligations come from a number of different sources, you need to understand *which* of these procedural rules applies where. We call this the "trigger" (or threshold) – where is a given procedural obligation triggered? Where procedural rules come from legislation (typically, but not always, the legislation that gives the decision-maker his or her powers in the first place), the answer to the trigger question is in the legislation itself. So too with the "general statutes about procedure" – they contain their own triggers. So you need to be careful to read that legislation if it applies to your decision-maker. (And a word of warning: make sure the statute does apply to your decision-maker. Ask: could a provincial general procedural statute ever apply to a federal administrative decision-maker?)

We can make more general observations about other sources of procedural obligations. The readings focus in particular on the trigger for common law procedural fairness. Basically, there are two triggers: what we can call the *Knight v. Indian Head* (three-prong) trigger and a concept known as legitimate expectation. Where the requirements of these triggers are met, then procedural fairness is owed by the administrative decision-maker. What that means in practice is a more complex discussion involving consideration of the content of the procedural fairness. More on that below.

For our purposes here, make sure you understand when common law procedural fairness is triggered. And be sure you focus your attention on the *modern* rules – there is history in these readings, which should help clarify where the modern rule comes from. But history is history, and on the exam you need to understand the rule that applies *now*.

Pay attention to some of the exceptions and constraints on the triggers as well. So, for legitimate expectation, note the courts' views on procedural versus substantive promises. For the Knight trigger, the readings talk about final versus preliminary decisions (and the related issue of investigations and recommendations). Note also exceptions to this exception.

We turn to other exceptions to the triggering of procedural fairness in the next section.

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4. Procedural Obligation Triggers (Legislative Decisions & Emergencies) — CB 113-132; 156-157

Common law procedural fairness rules may also fail to be triggered where there are emergencies, and also where a decision is said to be of a "legislative" nature. Be wary of the latter; it is a very amibguous concept. In its clearest form, it means no procedural fairness where an administrative decision-maker is introducing, e.g., a regulation (that is, a form of delegated legislaton). But a "legislative decision" means more than this – boiled down to its essence, it can be a decision that is sufficiently general, and not particular to or focused on a reasonably narrow subset of persons. Exactly what this means you need to contemplate in looking at the readings. And you need to appreciate that the general rule – no procedural fairness where decision is legislative in nature – is itself subject to exceptions.

5. Procedural Obligation Triggers (Charter & Bill of Rights) CB 178-251

Now we turn to the triggers for another source of procedural obligations: Charter s.7 and Bill of Rights. A first observation on the Charter. This is administrative law, not constitutional or criminal law. It will almost always be wrong in an administrative law exam to discuss Charter rights other than section 7 – you are not being examined on s.11 rights or s.2 or s.15. (Section 11(d) for instance almost never applies to administrative bodies, unless the criteria for its application are met by, for example, the existence of contempt powers).

But with section 7, the situation is different because this provision does impose the requirement to observe "fundamental justice" – a concept with procedural content – on at least some administrative decision-makers. Which ones? Well, those making decisions that go to life, liberty or security of the person. Do *not* make the mistake of assuming that all (or even much) administrative decision-making relates to these interests. But some of it does and you need to understand how and where this trigger works.

The Canadian Bill of Rights is similar in many respects, but not all by any measure. Note carefully to whom it applies. Think about whether you ever want to say that a decision-maker exercising power under a provincial statute is subject to the Bill. Also look at the triggers for sections 1(a) and 2(e) and note the extent to which they are the same and differ from Charter s.7. Above all, recognize that these two provisions have their own triggers that have to be satisfied before they apply at all.

6. Content of Procedural Obligations (Right to be Heard) CB 37-53 (first half of the Baker case dealing with procedural fairness); 255-258; 274-278; 285-303; 308-406; 411-421; 425-440.

We turn now to the question: if procedural obligations are triggered, what does the decision-maker have to do? Or more concretely, what is the content of these procedural obligations?

If your procedural obligation comes from a statute – the enabling act or one of the special legislated procedural codes discussed at CB 77-85, the answer to this question is: "whatever the statute says is the content is the content". (However, there may be occasions in which you will have to determine whether the statute is a "complete code" or leaves room for common law supplementation.)

Life is more complex if your trigger is the common law, Charter or Bill of Rights. While there are some differences, generally speaking, the content where these sources apply boils down to two broad classes of procedural rules: a right to be heard and a right to an unbiased decision-maker.

Within these two classes, there are many details, and you still need to understand "what does it mean in practice to have a right to be heard and what does it mean in practice to have a right to an unbiased decision-maker".

The basic issue is this: the precise content of procedural rules coming from the common law, Charter or Bill of Rights varies from case to case according to the circumstances. Certainly with respect to the right to be heard, you must start with the Baker considerations: Baker gives you a (non-exclusive) list of considerations that tell you at least something about content. Specifically, the Baker test suggests whether the content will be robust or not. (It actually tells you a little bit more if your trigger is legitimate expecations: with legitimate expectations, the content of the procedural obligation is generally what was promised in the procedural promise that gave rise to the legitimate expectation in the first place. If the promise was substantive, you will not be able to enforce it directly, but at the very least, it may lead to enhanced or more procedural fairness.)

Of course, one can't stop at an outcome that just says "robust or lots of procedural fairness, or not". That's not enough. One has to unpack that concept and focus on specific procedural entitlements: how much notice; what sort of hearing; how much disclosure, etc., etc.. So the readings review a series of procedural entitlements and propose some lessons on when these particular procedural entitlements might exist and to what degree. Be attentive to this jurisprudence.

A word of warning: when it comes to an examination, you do need to explore which procedural entitlements are owed and whether they have been met, but if you're pay no heed to the sorts of circumstances that give rise to these specific entitlements, you may end up with an implausible laundry list of procedural rules that you say should apply when they really don't. An uncritical laundry list is not satisfactory analysis and does not generate more marks.

7. Content of Procedural Obligations (Unbiased Decision-maker) — CB 441-556

The second broad class of procedural obligations associated with the common law, Charter s.7 and the Bill of Rights is the right to an unbiased decision maker.

Here the material deals with bias stemming from individual conduct (attitudinal bias or prejudgment; pecuniary interests; past conduct etc.). Here too there are tests for exactly what rule barring bias applies to a given administrative decision-maker. There is not just one universal standard, especially when it comes to alleged prejudgment or attitudinal bias. These readings will help you understand what the tests are and where they apply.

The materials also deal with "independence" or institutional bias. A word of warning: do not rush to the assumption that independence rules flow from all instances where procedural entitlements might be owed. It would be wrong, for example, to urge that where a statute creates an administrative regime that you think is insufficiently independent, common law procedural fairness can be used to attack this arrangement. Be attentive to the discussion at 547 and 548. The common law cannot prevail over a statute. And so, your independence argument would have to be based on a s.7 Charter or Bill of Rights source, assuming these are even triggered.

8. Content of Procedural Obligations
(Issues arising from institutional decision-making)

CB 557-603; 607-610; 617-643

In this part, we deal with an area that has elements of both the right to be heard and the right to an unbiased decision-maker: institutional decision-making. You need to understand the concept of subdelegation. The *delegatus non potest delegare* concept sounds like a pretty potent bar on an administrative decision-maker sub-delegating powers to another actor, but there are so many circumstances where sub-delegation is permissible that, really, sub-delegation tends to be important only when certain functions are sub-delegated that offend procedural rules. The concept of "he or she who hears" is an example, tied to the right to be heard. This is an issue that becomes complicated when large, multi-member boards are asked to make decisions that are consistent while at the same time they sit to hear similar cases, but in panels with less than full membership.

Another issue for these big boards, when they try to make consistent decisions, is when and where bias concepts are offended.

Yet another issue raised by these materials is if these big board can use guidelines to try to standardize decisions. If they do, do they wrongly "fetter their discretion"? (But note that fettering of discretion is a substantive review issue, and so is really governed by the sorts of considerations discussed in the next section.)

Substantive Review Materials	S&F, chapters 8, 9, 10 and 11 (note that S&F was published just as *Dunsmuir* was released and thus these S&F readings are not fully up to date)
9. Backdrop to the Standard of Review Analysis We shift to the second major issue area in administrative law: review on "substantive" grounds. Basically, substantive errors are errors of fact, law or discretion, although these are sometimes labelled in different ways. (You will also see reference to errors of jurisdiction, although this has meant different things at different times. Now, a "true error of jurisdiction" is something you need to consider post-Dunsmuir. Dunsmuir is discussed below.) In this part, you'll soon learn that simply looking at a decision and saying that it reflects an error of fact (a misapprehension of the facts), of discretion (a wrong choice or outcome) or of law (a misconstrual of the law) is not enough. That is because substantive errors are all subject to what is known as the "standard of review", a very difficult and complex area of administrative law. Notice that we do not mention standard of review in our discussion of procedural entitlements. That is because you <u>do not do</u> a standard of review analysis for procedural entitlements. It is wrong to say you do – with procedural fairness, you apply the rules discussed above. In these background readings, you are introduced to the concept of a privative clause. Once you understand it – and the courts' efforts to get around such clauses – you'll understand at least part of the initial impetus for standard of review analyses. Then, there is some history looking at failed precursors to the standard of review analysis.	CB 673-677; 698-700; 706-719; 804-817 (up until discussion of Border)
10. Evolution of the Standard of Review Analysis In this section, we build on the history lesson and have you read some more history, examining some of the key cases developing some of the concepts that still remain important in modern law – not least the application of the "pragmatic and functional" test to errors of law and ultimately discretion. But this is still history. You're not at the current law yet.	CB 723-737; 768-776; 821-831; 53-62 (second half of Baker dealing with abuse of discretion); 954-963; 971-993

11. The Current Test These are the readings on substantive review that bring you up to speed. Dunsmuir is your focus. Understand it. Understand how it creates two standards of review, and what each means. Understand how it changes the test used to decide which of these two standards of review should be applied. Consider how Dunsmuir has been interpreted by other courts and in other cases. No, it hasn't been construed perfectly consistently and there are elements of post-Dunsmuir cases (like Khosa) that seem to go back to a "pragmatic and functional" test. But consider also the recent case of Smith and what it seems to suggest about Dunsmuir's meaning. It proposes a pretty simple standard of review test.	CB 679-696 (please also read the missing extract from *Dunsmuir*, placed at p. 847-48); 783-786; 863-869; 879-885; 799-804; 834-838; 848 (picking up from end of *Dunsmuir* extract)-861; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, headnote and paras. 22-58
Challenging Administrative Decisions	
12. Venue and Basic Procedure for Judicial Review Now that you understand the law, it is time to understand how one goes about challenging an administrative decision. In some cases, there may be what is known as a "statutory right of appeal" or "administrative appeal" – there may be a statute out there (often the enabling statute) that allows someone to appeal the decision of the decision-maker, sometimes to a court and sometimes to another administrative decision-maker. If there is such a statutory right to appeal, one generally must "exhaust" it before turning to judicial review, for reasons that are part of readings later on. The rules governing these statutory appeals will be governed by the statute itself. Judicial review is different – do not confuse the two. Judicial review is part of the inherent powers of superior courts to review the exercise of powers by executive branch officials. Today, this form of relief is generally codified or provided for in primary legislation or Rules of Court. This section concentrates on one of the issues associated with judicial review: standing, or the question of who gets to bring a judicial review application. It also deals with venue: which court one goes to.	CB 1087-1132; 1039-1055
13. Remedies This last part looks at the relief that can be provided on judicial review and through separate and different legal proceedings. It focuses on: the sorts of remedies available on judicial review; the fact that the award of remedies on judicial review is discretionary and may be denied on some of the grounds discussed in the materials; and, the fact that there are civil remedies that may overlap with the sorts of errors that give rise to judicial review, but that these are governed by their own rules and procedures.	CB 1087-1132; 1039-1055 S&F, ch. 3, CB 1055-1076, 1141-1205; 1207-1254; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62; *Vancouver (City) v. Ward*, 2010 SCC 27.

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This is a listing for all the provinces and is highly recommended — www.canlii.org

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British Columbia (Queen's Printer): http://www.bclaws.ca/
Alberta (Queen's Printer): http://www.qp.alberta.ca/

Supreme Court Judgments

http://scc.lexum.org/en/index.html